

MAY 19 2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

CLERK, US DISTRICT COURT
NORFOLK, VA

Name (under which you were convicted): Maceo Spates Docket or Case No.: 2:11cv 284

Place of Confinement: SUSSEX 2 STATE PRISON Prisoner No.: 1199722
24427 MUSSELWHITE DR.
WAVERLY, VA 23891

MACEO SPATES v. HAROLD CLARKE, DIRECTOR, VA DEPT. OF CORR.
Petitioner *Respondent*

The Attorney General of the State of Virginia: The Hon. Kenneth Cuccinelli

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Virginia Beach Circuit Court
2425 Nimmo Parkway
Virginia Beach, VA 23456

- (b) Criminal docket or case number (if you know):

CR06-130

2. (a) Date of the judgment of conviction (if you know):

May 8, 2007

- (b) Date of sentencing:

August 15, 2007

3. Length of sentence:

Thirty-four (34) years

4. In this case, were you convicted on more than one count or more than one crime?

Yes

5. Identify all crimes of which you were convicted and sentenced in this case:

Abduction (6 yrs.), Rape (25 yrs.), Unlawful Wounding (3 yrs.), Petit
Larceny (\$500.00 fine)

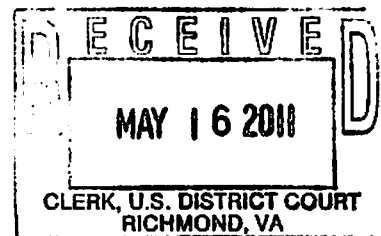
6. (a) What was your plea? (Check one)

(1) Not Guilty ☒
(2) Guilty ☐

(3) Nolo contendere (no contest) ☐
(4) Insanity plea ☐

- (b) If you went to trial, what kind of trial did you have? (Check one)

Jury ☒ Judge only ☐



7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: Virginia Court of Appeals

(b) Docket or case number (if you know): 2151-07-1

(c) Result: Denied

(d) Date of result (if you know): September 10, 2008

(e) Citation to the case (if you know): Spates v. Commonwealth (Record No. 2151071)

(f) Ground[s] raised:

(1) The trial court violated petitioner's Fourteenth Amendment right to Due Process of Law in convicting him based on insufficient evidence as a matter of law.

(2) The trial court erred in denying petitioner's motion for mistrial based on juror overhearing conversation.

(3) Petitioner did not waive his right to counsel.

(g) Did you seek further review by a higher state court? Yes ☒ No ☐

If yes, answer the following:

(1) Name of court: Virginia Supreme Court

(2) Docket or case number (if you know): 2151-07-1

(3) Result: Denied

(4) Date of result (if you know): April 27, 2010

(5) Citation to the case (if you know): Spates v. Commonwealth (Record No. 2151071)

(6) Ground[s] raised:

(1) The trial court violated petitioner's Fourteenth Amendment right to Due Process of Law in convicting him based on insufficient evidence as a matter of law.

(2) The trial court erred in denying petitioner's motion for mistrial based on juror overhearing conversation.

(3) Petitioner did not waive his right to counsel.

(h) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐ No ☒

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "yes", give the following information:

- (a) Name of court: Virginia Beach Circuit Court
- (b) Docket or case number (if you know): CL10-3804
- (c) Date of filing (if you know): July 12, 2010
- (d) Nature of the proceeding: State Habeas Corpus Petition
- (e) Grounds raised:

(1) The trial court violated petitioner's Fourteenth Amendment right to Due Process of Law in convicting him based on insufficient evidence as a matter of law.

(2) The trial court erred in denying petitioner's motion for mistrial based on juror overhearing conversation.

(3) Petitioner did not waive his right to counsel.

(f) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☒

(g) Result: Denied

(h) Date of result (if you know): November 2010

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. State the facts and law supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE THROUGH THREE:

SEE ATTACHMENT, HABEAS CLAIMS

(a) Supporting facts and Law (State the specific facts and law that support your claims):

SEE ATTACHMENT, HABEAS CLAIMS

(b) If you did not exhaust your state remedies on GROUND ONE THROUGH THREE, explain why:

N/A

(c) Direct Appeal of GROUND ONE THROUGH THREE:

(1) If you appealed from the judgment of conviction, did you raise these issues?

Yes ☒ No ☐

(2) If you did not raise these issues in your direct appeal, explain why:

N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☒ No ☐

(2) If your answer to Question (d) (1) is "Yes," state:

Type of motion or petition: Habeas Corpus Petition

Name and location of the court where the motion or petition was filed: Virginia Beach Circuit Court

Docket or case number (if you know): CL10-3804

Date of the court's decision: November 2010

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "No," explain why you did not raise this issue:

Because an appeal would have been moot, as the filing of the habeas petition raising the three grounds was moot due to the fact that petitioner had already exhausted those grounds on his direct appeal.

(e) OTHER REMEDIES: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on GROUND ONE THROUGH THREE:

None

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction?

Yes ☒ No ☐

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented and state your reasons for not presenting them:

None

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?

Yes ☐ No ☒

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging?

Yes ☐ No ☒

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary and plea: Janee D. Joslin, Esq., 304 34th St., Ste. 8, Va. Beach, VA 23451

(b) At arraignment and plea: Janee D. Joslin, Esq., 304 34th St., Ste. 8, Va. Beach, VA 23451

(c) At trial: **Pro-Se**

(d) At sentencing: Janee D. Joslin, Esq., 304 34th St., Ste. 8, Va. Beach, VA 23451

(e) On appeal: Janee D. Joslin, Esq., 304 34th St., Ste. 8, Va. Beach, VA 23451

(f) In any post-conviction proceeding: **Pro-Se**

(g) On appeal from any ruling against you in a post-conviction proceeding: **Pro-Se**

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

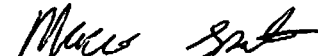
Yes ☐ No ☒

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago. You must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.

N/A as the petition is being timely filed.

Therefore, petitioner asks that the Court grant the following relief: that a writ of habeas corpus be awarded, an evidentiary hearing be held, and any other relief to which petitioner may be entitled.

Respectfully submitted,



Signature of Petitioner

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this petition for Writ of Habeas Corpus was placed in the prison mailing system on this

30th day of March, 2011



Signature of Petitioner

7176431

BRIEF IN SUPPORT OF
PETITION UNDER 28 U.S.C 2254 FOR WRIT
OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

MACEO ALI SPATES
PETITIONER.

V.

COMMONWEALTH OF VIRGINIA
RESPONDENT

PETITION FOR RELIEF FROM A
CONVICTION OF SENTENCE BY A PERSON IN STATE
CUSTODY

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STATEMENT OF PROCEEDINGS

ON January 17, 2006, a Grand Jury of the City of Virginia Beach indicted the Appellant, Maceo Ali Spates, on charges of abduction armed statutory burglary, unlawful wounding, rape, petit larceny, and wearing a mask on private property. The appellant entered pleas of not guilty to all charges. A Jury was impaneled. The Appellant was found guilty of rape, abduction, unlawful wounding and petit larceny. The Appellant was found not guilty of armed statutory burglary and wearing a mask on private property.

On August 15, 2007, The Honorable Judge H. Thomas Padrick, Jr., formally imposed the jury's sentencing recommendation. He sentenced the Defendant to six years on the charge of abduction, twenty-five years on the charge of rape, and three years of unlawful wounding. For the charge of petit larceny, the Appellant was ordered to pay a fine of \$500.00. The active sentence is thirty-four years of incarceration. Appellant was also ordered to have two years of post-release supervision and pay court costs.

On August 16, 2007, prior Counsel timely filed a Notice of Appeal. Counsel for Mr. Spates filed the transcript of the hearings regarding pretrial motions, the trial, and the sentencing hearing, making them a part of the record on this appeal on October 12, 2007.

On January 2, 2008, a Petition for Appeal was filed with the Court of Appeals. The Commonwealth filed their Brief in Opposition on January 25, 2008. On September 10, 2008, the Court of Appellant's prior court-appointed counsel.

On July 27, 2009, Appellant filed a Petition for Writ of Habeas

Corpus Based upon four grounds, including, but not limited to, ineffective assistance of appellate counsel. The Attorney General's office filed an Answer and Motion to dismiss on September 25, 2009. On October 27, 2009, Judge H. Thomas Padrick, Jr. entered an Order awarding Appellant a delayed appeal based upon his claims of prior counsel's ineffective assistance as his appeal was never taken to the Supreme Court after being denied by the Court of Appeals.

On November 24, 2009, Judge Padrick appointed this counsel to assist Appellant in his delayed appeal. Therefore, a Notice of Appeal was timely filed with the Court of Appeals on December 11, 2009. On December 28, 2009, and extension to file a Petition for Appeal. The Motion was granted on December 28, 2009, and extension to file a Petition for appeal was given until January 27, 2009.

QUESTION PRESENTED

- I. DID THE TRIAL COURT ERR IN RULING THAT EVIDENCE TO CONVICT MR. SPATES WAS SUFFICIENT AS A MATTER OF LAW? (PRESERVED AT Tr 05/08/07 at 229-340, 392-393, 475-476) (Assignment of Error #1)
- II. DID THE TRIAL COURT ERR IN DENYING MR. SPATES' MOTION FOR A MISTRIAL BASED UPON A JUROR OVERHEARING CONVERSATIONS BETWEEN THE LAWYERS AND WITNESSES? (Preserved at TR 05/08/07 at 270-276) (Assignment of Error #2)

III. DID THE TRIAL COURT ERR BY DETERMINING THAT MR. SPATES WAIVED HIS RIGHT TO COUNSEL DESPITE HIS REQUESTS FOR COUNSEL AT THE TIME OF TRIAL?
(Preserved at TR 05/07/07 at 4, 17-18, 21, 26, 26, 27, 28, 29) (Assignment of Error #3)

ASSIGNMENTS OF ERROR

The Appellant respectfully argues that the September 10, 2008, decision constituted error by the Court of Appeals of Virginia in the following ways:

- I. That Court erred by failing to hold that the Trial Court erred in ruling that evidence to convict Mr. Spates was sufficient as a matter of law, and;
- II. That court erred by failing to hold that the Trial Court erred in denying Mr. Spates' Motion for a Mistrial based upon a juror overhearing a conversation in the courtroom between the lawyers and witnesses in which prejudicial was disclosed, and;
- III. that Court further erred by failing to hold that Trial Court did not afford Mr. Spates his right to counsel after he requested counsel numerous times at the time of trial.

STATEMENT OF SIGNIFICANT PRECEDENTIAL VALUE

In cases such as this' where the trial court failed to recognize that evidence to convict Mr. Spates was insufficient as a matter of law this Court needs to delineate a clearer standard of decision making by the trial court. This is necessary to prevent further convictions where the Commonwealth did not satisfy their burden of proving all elements of each offense beyond a reasonable doubt.

The Court should also delineate a clearer standard of decision

The Court should also delineate a clearer standard of decision making by the trial court in cases where the defendant moves for a mis-

trial based upon valid reasoning. In this case, the juror overheard words prejudicial to Mr. Spates, 'change' and "defense", in the same sentence.

This is important and necessary to ensure that defendants receive a fair trial by an impartial jury of their peers as afforded by the Sixth Amendment.

When a defendant signs a waiver of counsel, he should be aware of exactly what he is signing, which was not the case in this matter. The defendant at the time of trial requested assistance by counsel and was not afforded that right. The Court should have a clear standard of how a Defendant should be questioned when deciding to proceed pro se so that the Court can ensure that the defendant is making the decision freely, voluntarily, and knowingly.

STATEMENT OF FACTS

---Mr. Spates' Defense---

During his trial, Maceo Spates testified on his own behalf and told the jury that he had consensual sex with Lisa Waller. (TR 05/08/07 at 348) Mr. Spates testified that they had met around March, 2004 through Tara and Tara's brother, Ms. Waller's fiance. When he came on a trip from Miami, Fla. He testified that they exchanged phone numbers the day they met, called each other back and forth, and got to know each other a little bit. (TR 05/08/07 at 348) October 9, 2004, was when Ms. Waller and Mr. Spates finally got together physically, according to Mr. Spates. Mr. Spates testified that Ms. Waller called him to let him know Tara was going to be out of town, so he came to Virginia Beach to be with her. (TR 05/08/07 at 350)

That night, Mr. Spates told Ms. Waller that Tara was HIV Positive. (TR 05/08/07 at 350) Ms. Waller became hysterical and began

saying things like that her life is on the line and that her life was over. (TR 05/08/07 at 350) Mr. Spates told Ms. Waller that he did not have HIV, although he was not sure at that moment whether he had contracted the disease from Tara or whether he was healthy in that regard. (TR 05/08/07 at 350-351) Mr. Spates testified that they got into a physical altercation and Ms. Waller went downstairs, grabbed a knife, and returned upstairs stating that he had ended her life. (TR 05/08/07 at 351) Mr. Spates testified that the cuts on Ms. Waller's hands were actually from her. (TR 05/08/07 at 351)

He continued, testifying that Ms. Waller asked him to leave. Mr. Spates told her to take him back to the airport. (TR 05/08/07 at 351) Ms. Waller refused, so Mr. Spates grabbed the telephone from Mr. Spates, stating that she was going to call Tara to get to the bottom of the HIV situation. (TR 05/08/07 at 351-352) Mr. Spates then left the residence and flew back home. (TR 05/08/07 at 352) He testified that he wanted to get Tara first to talk to her about what had happened that night, specially that he wanted to deny having sex with Ms. Waller, as he still wanted to be with Tara. (TR 05/08/07 at 352-353) Once he was unable to reach Tara, He called Tara's sister Carmin Young, to try to reach Tara and he was told she was in Atlanta visiting her sister. (TR 05/08/07 at 353)

Carmin Young testified that she knew Mr. Spates, as he was her sister's ex-boyfriend. (TR 05/07/07 at 223-224) She testified that on October 9, 2004, around 8 a.m., she received a telephone call from Mr. Spates at her home in Atlanta. (TR 05/07/07 at 224)

He stated that he was in Virginia and that Lisa had let him into the house and told him Tara was at Carmin's house. (TR 05/07/07 at 225-227) In a later conversation, Mr. Spates had called her and was very upset about Tara being HIV positive and about them not being together.

(TR 05/07/07 at 227-230)

THE PROSECUTION'S INSUFFICIENT EVIDENCE

Lisa Waller testified that on the weekend of October 8, 2004, through October 10, 2004, she was living with Tara Ebe, at 3935 Morning View Drive in Virginia Beach. (TR 05/07/07 at 106-107) Prior to that time, she had met Maceo Spates one time when he was visiting Tara Ebe and they were out at a sports bar. (TR 05/07/07 at 107) She testified she did not recognize him in the courtroom. (TR 05/07/07 at 107) Mr. Spates did not live in the area at the time Ms. Waller knew him. (TR 05/07/07 at 108)

Ms. Waller lived with Ms. Ebe for approximately three months in the aforementioned townhouse, (TR 05/07/07 at 108) On that October weekend, Ms. Ebe and Ms. Waller's fiancé were out of town, and Ms. Waller was home alone. (TR 05/07/07 at 110) After she had lain down in her bed and had fallen asleep, she was awakened by someone being on her back. (TR 05/07/07 at 113-114) The person on her back was telling her that she smelled good and he had a knife to her throat. (TR 05/07/07 at 114) She testified that she tried fighting the person off by grabbing the knife, which caused several lacerations to her fingers. (TR 05/07/07 at 114-115) The person picked her up and threw her back on the bed after they went to the floor. Then Ms. Waller went to reach for the window, but he grabbed her and she struggled with him. Then this person put her in a choke hold causing her to almost pass out. Then he picked her up, put her on the bed on her stomach, pulled her pajamas down, and raped her. (TR 05/07/07 at 114-115)

This man had a mask on his face, and was wearing all black clothing, including a hooded sweatshirt, so Ms. Waller never saw her attacker's face. (Tr 05/07/07 at 115) In addition to the lacerations to her fingers, Ms. Waller testified that she also had a mark on her neck from where the knife blade was pressing. (TR 05/07/07 at 116)

After the encounter, the attacker sat back up against the wall, and stated he didn't want to do this to her, but he had to show Tara that he was serious about what he had said to her. (TR 05/07/07 at 118) Ms. Waller Testified that she didn't know what the man was talking about. (TR 05/07/07 at 118)

The man continued talking to Ms. Waller for approximately two to three hours. He said he was a hit man hired to kill Tara and her kids. Ms. Waller testified that the man talked in detail about Tara's family members, including calling them by name. (TR 05/07/07 at 119-120)

Ms. Waller also testified that the attacker stated he was hired as a hit man because Tara allegedly gave AIDS to the man that hired him, and he wanted him to Tara. The man allegedly told Ms. Waller that he had previously faped over 200 girls. (TR 05/07/07 at 120)

Ms. Waller testified that the attacker told her to come to sit on the top of the stairway while he wiped down the whole stairway and anything else he touched in her home. (TR 05/07/07 at 122) Then,

he told her to vcome and sit on the couch downstairs while he made a phone call, allegedly to someone named joe or jo-jo. (TR 05/-7/07 at 122-123) After that, MS.Waller testified that the attacker stated he would let her go, that she better not make any phone calls, and that he was going to Geor̃gia to kill Tara and her kids. (TR 05/07/07 at 123) He apologized, saying he was sorry he did that to her, but that he to get the message out some kind of way, testified Ms.Waller. (TR 05/07/07 at 125)

The attacker then and Ms.Waller grabbed her keys so she could leave the house, but he burst back into her home.(TR 05/07/07 at 125) He immediately ran back upstairs and grabbed some papers from Ms Ebe's room and left again. (TR 05/07/07 at 126)

Ms.Waller left her home in her vehicle. (TR 05/07/07 at 126)

As she was walking out of her home, ~~she heard the sounds of~~ squealing tires coming from agray light-type car. (TR 05/07/07 at 127) The first call she made was to Tara Ebe to apprise her of what had just happened to her and that the attacker stated he was coming to Georgia to kill her and her kids. (TR 05/07/07 at 127)

Ms.Waller drove to her girlfriends house and called 911 and the ambulance came and picked her up. (TR 05/07/07 at 127-128) The

ambulance transported Ms. /Waller first to the emergency room and then for a forensic examination somewhere else. (TR 05/07/07 at 129-130)

Ms. Waller testified that she did not engage in consensual sex with the defendant. (TR 05/07/07 at 133)

Tarasita Ebe testified that she has a child in common with Mr. Spates. (TR 05/07/07 at 206) In October of 2004, she was living at the same address as Ms. Waller. (TR 05/07/07 at 206) She had previously broken up with Mr. Spates and they were not on good terms. (TR 05/07/07 at 206) Ms. Ebe testified that Mr. Spates and Ms. Waller had met during the weekend of October 8, 2004, she testified that she was in Atlanta visiting family. (TR 05/07/07 at 209) Before departing for Atlanta, she secured her home by locking the locks on the front door. (TR 05/07/07 at 210) She also testified to locking her bedroom door. (TR 05/07/07 at 210)

In the early morning hours of October 9, 2004, she received frantic call from Ms. Waller. (TR 05/07/07 at 211) Ms. Waller was crying and screaming and warning her to be careful because someone was allegedly coming to kill her and her kids. (TR 05/07/07 at 211-212)

~~The Defendant moved to strike the petit larceny and armed~~
burlary charges on the grounds that the Commonwealth failed to prove he broke into Ms. Waller's home and stole anything. (TR 05/08/07 at 339)

The Commonwealth objected and the Court overruled the Defendant's motion on the grounds that there was sufficient evidence to move forward on those charges. (TR 05/08/07 at 340)

THE FACTUAL BASIS FOR THE MISTRIAL

Before Court began on the second day of this jury trial, a juror named Mr. Taurman walked into the courtroom while a conversation was being had by MS.McArdle, the prosecutor, the police detective, the forensic biologist, and Mr.Spates's standby counsel, Ms.Joslin. Ms.McArdle was telling the forensic biologist that Mr.Spates was changing his defense to consent now. The juror walked into the courtroom as Ms.McArdle said the aforementioned statement, and questioned him regarding what he overheard. (TR 0508/07 at 270-272) Mr. Taurman stated that he heard some words, and the words defense and change were in the group of words that he heard. (TR 05/08/07 at 272) Mr. Taurman was then excluded from the courtroom. (TR 05/08/07 at 273) The Judge concluded that he did not believe Mr.Taurman heard anything. (TR05/08/07 at 273) Mr. Spates immediately moved for a mistrial on the grounds that the juror, Mr.Taurman overheard prejudicial words to Mr.Spates' case.(TR 05008/07 at 273-274) Mr. Spates' standby counsel, MS.Joslin, concurred with the Mr.Spates' Motion for a Mistrial, stating that the words heard by Mr.Taurman, defense and change, were very prejudicial words and would serve as a basis for a mistrial. (TR 05/08/07 at 274) Ms.Joslin stated that there probably would not be another conclusion to be drawn after hearing those prejudicial words other than Mr. Spates having changed his defense. (TR 05/08/07 at 274) Ms.Joslin noted that during Ms.McArdle proffer as to the statements made by her during the conversation overheard by

Mr. Taurman, Ms. McArdle actually said to the forensic biologist, he has changed his defense. Ms. Joslin continued, stating that the only word not heard by Mr. Taurman was a pronoun, and that it is only logical to infer that Mr. Spates had changed his defense, which is prejudicial. Ms. Joslin also pointed out that what Mr. Taurman overheard was consistent with what Ms. McArdle admitted to stating during the conversation.

(TR 05/08/07 at 275) The judge denied Mr. Spates' Motion for a Mistrial on the grounds that he felt the actions were totally innocent.

(TR 05/08/07 at 276) Mr. Spates' exception to the Court ruling was noted (TR 05/08/07 at 276)

MR. SPATES DID NOT WAIVE HIS RIGHTS TO COUNSEL

At the time of trial on May 7, 2007, Mr. Spates was not ready to proceed **PRO SE**. Mr. Spates told the Court repeatedly that he could not represent himself. On February 12, 2007, with Judge Shockley presiding, he did not fully understand the ramifications of such a decision.

(TR 05/07/07 at 10) In granting Mr. Spates' Motion, Judge Shockley did explain the ramifications of proceeding **PRO SE**

Ms. Joslin, to remain on the case as standby counsel only at Ms. Joslin's

(TR 05/07/07 at 5, 18) While Mr. Spates signed a waiver of counsel, he did not completely understand what he was signing, and he did not realize such until afterwards. (TR 05/07/07 at 28)

Before the jury trial started, Mr. Spates conveyed to Judge Padrick that he had retained counsel.(TR 05/07/07 at 4) However, Mr. brice never showed up. Therefore, Mr. Spates was forced by the Court to proceed PRO SE, although he expressed over and over again that he was not prepared and would not be able to represent himself.(TR 05/07/07 at 5,17,26-27,29)

ARGUMENT

I. THE EVIDENCE CONVICTING MR. SPATES WAS INSUFFICIENT AS A MATTER OF LAW

In determining whether evidence was sufficient to support a conviction, the reviewing court views evidence in the light most favorable to the Commonwealth and accords the evidence all reasonable inferences that may fairly be deduced therefrom. *higginbotham v. Commonwealth*, 216 Va. 349,352,218 S.E. 2d 534, 537 (1975). "To satisfy the due process requirements of the Federal Constitution, the prosecution must bear the burden of proving all elements of the offense beyond a reasonable doubt." *In re Winship*,397 U.S. 358, 363 (1970), quoted in *Stokes v. Warden*, 226 Va. 111, 117, 306 S.E.2d 882, _____ (1983).

Even in the light most favorable to the Commonwealth, the evidence presented at trial did not amount to proof beyond a reasonable doubt that Mr. spates raped or wounded Lisa Waller. Mr. Spates explained in his testimony that he had an ongoing relationship with Lisa Waller and that she had called to invite him to come up from florida to visit her while Tarasita Ebe was in atlanta. He said they had consensual sex and that hte then disclosed to Ms. Waller that he may have contracted HIV from Ms.Ebe. Ms.Waller became very upset and brought the knife into the situation herself while making suicidal comments as she feared had also contracted HIV.

Ms. Waller claiming that Mr. Spates raped and attacked her

at knife point, standing alone, does not rise to the level of proof beyond a reasonable doubt. This is especially true in light of the jury's verdict acquitting Mr. Spates of armed burglary and wearing a mask on private property after Ms. Waller testified that the person that attacked her had broken into her home and was wearing a mask entire time.

A fact finder's verdict will not be disturbed unless it was plainly wrong or without evidence to support it. *Albert v. Commonwealth*, 2 Va. App. 734, 741-742, 347 S.E. 2d 534, 538-539 (1986). When weighing the evidence, the fact finder is not required to accept entirely either the Commonwealth's or the defendant's account of the facts. *Pugliese v. Commonwealth*, 16 Va. App. 82, 92, 428 S.E. 2d 16, 24 (1993) (citations

omitted). The reviewing court does not substitute its

judgment for that of the jury, but instead asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Kelly v. Commonwealth*, 41 Va. App. 250, 257, 584 S.E. 2d 444, 447 (2003) (en banc) (citation omitted). The Virginia courts have stated that, when dealing with the sufficiency of a criminal conviction, "a suspicion of guilt, however strong, or even a probability of guilt is insufficient to support a criminal conviction." *Sutphin v. Commonwealth*, 1 Va. App. 241, 233, 337 S.E. 2d 897, 898 (1985). In addition, in order to convict, "the Commonwealth, must exclude every reasonable hypothesis of innocence."

Cantrell v. Commonwealth, 7 Va. App. 269, 289, 373, S.E. 2d 328, 338, (1988). The evidence in this case does not prove beyond a reasonable doubt that Mr. Spates raped or attacked MS. Waller, and accordingly, the convictions for rape, abduction, unlawful wounding and petit larceny should be reversed and dismissed.

II. MR. SPATES' MOTION FOR A MISTRIAL SHOULD HAVE
BEEN GRANTED DUE TO A JUROR OVERHEARING A
PREJUDICIAL CONVERSATION BETWEEN THE LAWYERS
AND WITNESSES

The trial court erred in denying Mr. Spates' Motion for a Mistrial after a juror overheard a conversation between the prosecutor, the police detective, the forensic, and Mr. Spates' standby counsel, Ms. Joslin.

The U.S. Supreme court has stated:

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is presumptively prejudicial if not made in pursuance of known Rules of the court and the instruction and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to the defendant. *Mattox v. United States*, 146 U.S. 140, 148-150 (1954); *Wheaton v. United States*, 133 F.2d 522, 527 (1943) quoted in *Remmer v. United States*, 347 U.S. 227 (1954).

In this case, Ms. McArdle, the prosecutor, was discussing chain of custody issue with the aforementioned people. The fact the juror overheard the statement of the Commonwealth Attorney that Mr. Spates was changing his defense was prejudicial to the case at hand and violated Mr. Spates' Sixth Amendment right to be tried by an impartial jury of his peers. Mr. Taurman, the juror involved in the conflict, also became the foreman for the jury panel, adding even more doubt to the fact that the jury was impartial. and at the time the defendant Mr. Spates had not testified in his defense.

The Court should have granted Mr. Spates' and his standby counsel, Ms. Joslin's joint Motion for a Mistrial as Mr. Spates' defense clearly was tainted by the jury foreman's knowledge that the defendant was changing his defense. Therefore, due to the fundamental unfairness resulting from the court's denial of the defendant's Motion for a Mistrial, Mr. Spates' convictions should be reversed.

The issue is whether the prosecutor and Judge violated the defendants' 6th, 14th amendment rights. 1) by discussing the case in the presence of the juror 2) The judge denying the motion for a Mistrial(tr.p.276) the discussion went on for minutes trying to understand and breakdown what the juror heard and what he got from the conversation. This is where the defendant believes the court erred. Because it is clear that the court could not decide rather the juror was biased. The sixth Amendment guarantees a criminal defendant the right to a trial by an impartial jury. No right touches more the heart of fairness in a trial (quoting Dennis Waldon Stockton V. Commonwealth of Virginia see (Remmer V. U.S. 347 U.S. 227, 98 L. ED.).

The defendant's right to an impartial jury requires that the government bear the burden of establishing the nonprejudicial character of the contact. SEE Haley 802 F.2d at 1535-36 and the defendant shows there's no point in the procedure where the commonwealth shows there's no prejudice or bias in making comments in front of the juror even though it was not intentional. It still lays a burden on a fair trial. SEE U.S. V. Raynard Carroll 678 F.2d 1208;(1982)

The judge could have issued curative instruction, so, that the juror could have struck what was said by the prosecutor. The comments at least would have been softened. But, the judge failed to give curative instruction to the juror also SEE U.S. V. Allen Morsley At 913-912). and The toughest blow to the defendant is when a prosecutor discusses the case of the defense and the defendant has not TESTIFIED

The prosecutor violates the defendant's 5th, 6th amendment Rights. The defendant stands not to be convicted except on the basis of evidence adduced against him. There's more than a fair possibility that improper comments contributed to defendant's conviction. SEE Fatty V. Connecticut 375 U.S. 85-86-87, ct. 229, 230, 11 L.ED. 2d 171(1963). The prosecutor case

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was built on circumstantial evidence it shows plainly because the juror found the defendant not guilty of armed statutory burglary and wearing a mask on private property this supports the issues of circumstantial evidence. and it's held in (U.S. V. Allen Morsley). That when the district court immediate curative instruction and the evidence of guilt was overwhelming. the prosecutor's statements while improper, constituted harmless error. this clearly not this case. Therefore, due to the fundamental unfairness resulting from the court's denial of the defendant's Motion for a Mistrial, Mr. Spates's convictions should be reversed.

III. THE TRIAL COURT ERRED BY DETERMINING THAT MR. SPATES WAIVED HIS RIGHT TO COUNSEL DESPITE HIS REQUESTS FOR COUNSEL AT THE TIME OF TRIAL

At the time of trial, Mr. Spates was not ready to proceed *pro se*. Instead, he told the Court repeatedly that there was no way he could represent himself as he did not know the procedures involved with defending himself at a jury trial.

On a previous date, Mr. Spates came before Judge Shockley and told her that he was expressing his fight to represent himself in this case. In granting Mr. Spates' motion, Judge Shockley appointed Mr. Spates' previously court-appointed counsel, Ms. Joslin, to remain on the case as standby counsel only at Ms. Joslin's request. Mr. Spates signed a waiver of counsel, but didn't realize such until afterwards. Mr. Spates believed he was signing a waiver allowing him to retain new counsel.

On the date of trial, Mr. Spates conveyed to Judge Padrick that he had retained counsel. However, Mr. Brice never showed up. Therefore, Mr. Spates was forced by the court to proceed *pro se* although he expressed over and over again that he was not prepared and would not be able to represent himself.

In **Superintendent v. Barnes**, 221 Va. 780, 784, 273 S.E. 2d 558 (1981). The supreme court of Virginia held that "the sixth Amendment commands that 'the accused shall enjoy the right...to have the assistance of counsel for his defense.'"

"If the accused...has not competently and intelligently waived his constitutional right [to counsel], the sixth amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty..." **Johson v. Zerbst**, 304 U.S. 458, 468 (1938).

The Court of appeals held that "the law requires more than the court's bare assumption that the defendant was aware of his right to counsel and knew of the pitfalls of self-representation." **harris v. Commonwealth**, 20 Va. App. 194, 197, 455 S.E. 2d 759, 760 (1995). "A party relying on such a waiver must prove its essentials by 'clear, precise, and unequivocal evidence. The evidence must not leave the matter to mere inference or conjecture but must be certain in every particular.'" **Church v. Commonwealth**, 230 Va. 208, 215, 335 S.E. 2d at 827 (quoting **White V. Commonwealth**, 214 Va. 559, 560, 203 S.E. 2d 443, 444 (1974))

Although Mr. Spates previously expressed that he wanted to proceed **pro se**, he told Judge Padrick at the time of trial that he was not ready to proceed because he was not prepared to represent himself. Judge Padrick insisted that Mr. Spates must proceed with the jury trial **pro se** unless his retained counsel showed up to assist him. Therefore, Mr. Spates' Sixth Amendment right to counsel was violated.

The defendant requested an attorney numerous times and the Judge Padrick refused. The defendant had no cause to delay the trial or ask for a continuance. It is held in (**UNITED STATES V. ISHMAEL GALLOP** 838, f. 2d 105). As long as the defendant can show he's not out to delay procedure counsel will be granted. The defendant and counsel had communicated on the subject in private and the counsel said that she saw no problem in representing the defendant because these are serious charges and complicated issues. The defendant trial was unfair

the defendant (Tr. Pg. 271)

CONCLUSION

for the errors committed in the questions Presented, the
convictions for rape, abduciton, unlawfrl wounding and petrit larceny
should be reversed, and the matter should be dismissed.

Respectifully submitted,
Maceo Ali Spates

Maceo Spates